

ARTER & HADDEN

ATTORNEYS AT LAW

founded 1843

ORIGINAL

Cleveland
Columbus
Dallas

1801 K Street, N.W. / Suite 400K
Washington, D.C. 20006-1301

202/775-7100 *telephone*

202/857-0172 *facsimile*

DOCKET FILE COPY ORIGINAL

Irvine
Los Angeles
San Francisco

Direct Dial: (202) 775-7960
Internet Address: jtroup@arterhadden.com

May 19, 1997

RECEIVED

MAY 19 1997

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
Washington, DC 20554

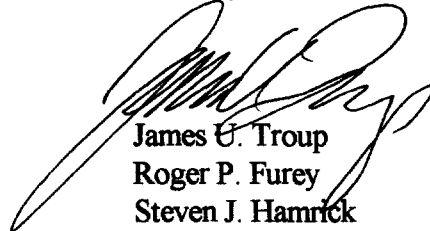
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: VarTec Telecom, Inc.'s Petition for Reconsideration
and Emergency Motion for Stay

Dear Mr. Caton:

Attached please find an original and four copies of VarTec Telecom, Inc.'s ("VarTec") Petition for Reconsideration (the "Petition"), and an original and four copies of its Emergency Motion for Stay. VarTec is filing Exhibit One of the Petition under separate cover with a Request that Information be Withheld from Public Inspection, because that exhibit contains proprietary commercial information. If you have any questions concerning VarTec's pleadings, or if you require further information, kindly contact VarTec's undersigned counsel.

Sincerely,



James U. Troup
Roger P. Furey
Steven J. Hamrick

Enc.

87445

No. of Copies rec'd 024
List ABCDE

DOCKET FILE COPY ORIGINAL **ORIGINAL**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAY 19 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Administration of the)
North American Numbering Plan)
Carrier Identification Codes ("CICs"))

CC Docket No. 92-237

**PETITION FOR RECONSIDERATION OF
VARTEC TELECOM, INC.**

VARTEC TELECOM, INC.

James U. Troup
Roger P. Furey
Steven J. Hamrick
Arter & Hadden
1801 K Street, N.W., Suite 400K
Washington, D.C. 20006-1301
(202) 775-7960

Its Attorneys

May 19, 1997

SUMMARY

VarTec Telecom, Inc. ("VarTec") hereby petitions the Commission to reconsider and vacate its mandate eliminating five digit Carrier Access Codes ("CACs") adopted in the Commission's Second Report and Order (the "Report and Order").¹ VarTec requests that the Commission adopt a grandfathering proposal proffered in this Petition, and allow for the coexistence and contemporaneous use of five digit and seven digit CACs. Despite the Commission's reservations regarding the technical feasibility of grandfathering, VarTec submits that it is currently using three digit CICs that begin with the numbers "5" and "6," without any technical problems involving four digit CICs that begin with the same numbers.

The Commission's Report and Order is "arbitrary and capricious" under the Administrative Procedures Act, 5 U.S.C. §§ 551-559 ("APA"), because the combination of the Commission's refusal to grandfather five digit CACs and its slashing the transition period will thwart, rather than further, the Commission's goals in this proceeding, namely the introduction and promotion of "new services and technologies and to support continued economic growth." Implementing the Report and Order will cause customer confusion and decreased revenues for dial-around long distance carriers, produce fewer CICs to assign to new services and new carriers, and result in less long distance telephone service competition than would be created by VarTec's grandfathering plan.

The Report and Order violates the Fifth Amendment of the United States Constitution by depriving VarTec of its property interest in its five digit CACs, effectively its service marks, without just compensation. The Report and Order deprives VarTec of all economic use of its five digit

¹ 62 Fed. Reg. 19,056 (Apr. 18, 1997).

CACs.

The Commission's Report and Order also violates VarTec's First Amendment right to freedom of commercial speech, by not adopting alternative regulations that advance the government's interest in this proceeding while avoiding an infringement of VarTec's commercial speech rights.

Finally, the Commission's Report and Order violates the Communications Act by adopting measures that create market entry barriers for small businesses, and the Regulatory Flexibility Act ("RFA") by not considering significant alternatives that minimize the regulations' impact on small businesses. The Commission's refusal to grandfather five digit CACs, requiring small interexchange carriers to bear the costs of consumer education rather than the large LECs, and failing to require LECs to provide a competitively-neutral intercept message, violate the RFA. In violation of Section 257 of the Communications Act, the Report and Order creates a substantial market barrier to the extension of VarTec's long distance telephone services by increasing costs (consumer education) and reducing revenues (lost from customer confusion).

TABLE OF CONTENTS

SUMMARY	i
I. INTRODUCTION	1
II. THE FCC SHOULD RECONSIDER AND ADOPT VARTEC'S FIVE DIGIT CAC GRANDFATHERING PROPOSAL.	3
III. ADMINISTRATIVE PROCEDURE ACT	9
IV. THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION	10
V. THE FIRST AMENDMENT OF THE U.S. CONSTITUTION	17
VI. THE COMMUNICATIONS ACT AND REGULATORY FLEXIBILITY ACT	20
VII. CONCLUSION	22
EXHIBIT ONE	
EXHIBIT TWO	

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Administration of the)	CC Docket No. 92-237
North American Numbering Plan)	
Carrier Identification Codes ("CICs"))	

**PETITION FOR RECONSIDERATION OF
VARTEC TELECOM, INC.**

VarTec Telecom, Inc. ("VarTec"), by its attorneys and pursuant to 47 C.F.R. § 1.429, respectfully submits this Petition for Reconsideration of the Commission's Second Report and Order¹ in the above-captioned proceeding (hereinafter referred to as the Report and Order). For the reasons set forth herein, VarTec respectfully requests that the Commission reconsider and vacate its mandate eliminating five digit Carrier Access Codes ("CACs") adopted in the above-captioned proceeding.

I. INTRODUCTION.

VarTec is a small interexchange carrier ("IXC") that provides services accessible through five digit CACs, of which the last three digits are a CIC that is exclusive to VarTec. The CAC allows the local exchange carrier to identify which long-distance service consumers use when placing long-distance calls. These codes also allow the public to make long-distance telephone calls

¹ 62 Fed. Reg. 19,056 (Apr. 18, 1997).

at discount prices without presubscribing to a long-distance service by dialing an additional five digits when placing the call. VarTec has spent the past seven years building a customer base that habitually uses this "dial-around" procedure to access VarTec's long-distance service.

VarTec currently provides its "dial-around" long distance services to more than 3 million customers in 48 states and the District of Columbia. VarTec's success is directly attributable to its strategy of offering competitively-priced long distance services to residential and business end users who access VarTec through its Feature Group D ("FGD") CACs. Each year, VarTec mails tens of millions of marketing pieces promoting its five digit CAC. The LECs with whom VarTec has previously purchased originating access and entered into billing and collection service agreements route long distance telephone calls to VarTec when the customer dials VarTec's CACs. Callers currently utilizing VarTec's CACs to reach VarTec for their long distance needs on a particular call basis account for more than 90 percent of VarTec's customer base and associated revenues.

The Commission initiated consideration of changes to its CIC administration in April 1994, when it proposed to expand FGD CICs from three to four digits (in anticipation of the assignment of all the three digit codes) to ensure that it could meet future demand for CICs.² The Commission also proposed a six-year transition, or permissive dialing period, from three to four digit CICs.³ In response to this Notice of Proposed Rulemaking, VarTec filed comments proposing a plan to grandfather and maintain VarTec's five digit CACs after the end of the permissive dialing period.

² See Administration of the North American Numbering Plan, Notice of Proposed Rulemaking, CC Docket No. 92-237, 9 FCC Rcd 2068 (1994) ("NPRM").

³ Id.

During the transition, callers and carriers are currently using both three digit CICs and four digit CICs beginning with a "5" or "6".⁴

On April 30, 1996, the Commission issued a Public Notice requesting information as to whether a shorter transition period was possible.⁵ In its Report and Order, the Commission decided to abbreviate its six-year transition period to less than nine months after its announcement, January 1, 1998, without first requiring reclamation of unused three digit CICs and either grandfathering the use of any five digit CACs or requiring LECs to provide an intercept message informing consumers of the new CAC when they dial the old CAC.⁶

II. THE FCC SHOULD RECONSIDER AND ADOPT VARTEC'S FIVE DIGIT CAC GRANDFATHERING PROPOSAL.

In its Comments, VarTec proposed the coexistence of five digit and seven digit CACs.⁷

VarTec recommended:

that existing long distance telecommunications service providers which currently have been assigned FGD CICs and are actively utilizing those codes should be 'grandfathered' from any expansion effort undertaken by the Commission. . . . [C]urrent technology in place at the LECs allows for the permanent co-existence of both five digit and seven digit CACs. The seven digit codes should merely supplement the existing five digit system rather than replacing it altogether. From a technical standpoint, it is both unnecessary and quite disruptive to phase out the five digit CACs subsequent to a short transition period.⁸

⁴ Id.

⁵ See Further Comments, Carrier Identification Codes, CC Docket No. 92-237, Public Notice DA 96-678 (Common Carrier Bureau, April 30, 1996) ("Public Notice").

⁶ See Report and Order at para. 4.

⁷ See Comments at 2.

⁸ Comments at 3-4.

The Commission failed to adopt this proposal in its Report and Order.⁹ By not adopting VarTec's grandfathering proposal, the Commission has sacrificed hundreds of CACs for future use.

Grandfathering five digit CACs leads to an increase in the number of available CACs in the long run, which is the very goal of the Commission in this proceeding.¹⁰ Similar software and switch reprogramming that currently allows switches to read both three digit and four digit CICs beginning with a "5" or "6", such as 10636 (one of VarTec's CACs) and 1016XXX, will allow for the implementation of VarTec's grandfathering plan. To comply with the Commission's Report and Order, all switches should be able to read a seven digit CAC by January 1, 1998. Under VarTec's grandfathering plan, all three digit CICs starting with "1" would be taken out of use so that a switch does not confuse 101XX with 101XXXX. Then, a switch capable of translating a five-digit CAC and a seven-digit CAC will be able to properly route the following CACs: 100XX, 102XX, 103XX, 104XX, 105XX, 106XX, 107XX, 108XX, 109XX, 1010XXX, 1011XXX, 1012XXX, 1013XXX, 1014XXX, 1015XXX, 1016XXX, 1017XXX, 1018XXX and 1019XXX.

VarTec's grandfathering plan would require the reassignment of three-digit CICs that have "1" as the first digit. However, only 70 such CICs have been assigned, making reassignment relatively easy. Most carriers that have been assigned three digit CICs starting with "1" also have been assigned three digit CICs starting with numbers other than "1" and can continue to use those CICs under VarTec's grandfathering plan. By allowing the use of both five digit CACs where the CICs do not begin with "1" and seven digit CACs, the Commission would, in the long run, make 900

⁹ See Report and Order at para. 4.

¹⁰ See NPRM at para. 2.

more CACs available for use than under its current expansion plan. Thus, VarTec's plan comes much closer to achieving the goal of the Commission's NPRM than does the Commission's plan.

The Commission cited concerns that grandfathering would interfere with four digit CICs that begin with the numbers "5" or "6."¹¹ Despite the fact that the Commission has already assigned such four digit CICs, and that those CICs are in active use, however, VarTec has used its three digit CICs beginning with "5" and "6" (595 and 636) without any problem to, or caused by, the four digit CICs beginning with the same numbers. Thus, coexistence, as outlined in VarTec's Comments, is working today, providing further evidence that it will work in the future.

The Commission concluded in the Report and Order that the dialing disparity between five and seven digit CACs during the transition period did not violate either Section 201(b) of the Act's prohibition against unreasonable practices or Section 202(a)'s prohibition against unreasonable discrimination.¹² The Commission reached this conclusion because "the transition is reasonable and necessary to avoid a flash-cut conversion to four digit CICs which would be contrary to the public interest."¹³ VarTec agrees with the Commission that the disparity between dialing a five digit CAC and a seven digit CAC is not unreasonable under the Act, and that converting all five digit CACs to seven digits "would be contrary to the public interest."

This legal analysis is not applicable to only a CAC conversion transition period. The difference between dialing five digit CACs and seven digit CACs does not hinder competition, and is reasonable under the Act. All interexchange carriers can compete to become a subscriber's

¹¹ See Report and Order at para. 46.

¹² See Report and Order at para. 32.

¹³ Id.

primary interexchange carrier ("PIC") which allows calls to be placed by dialing fewer digits and no CAC. However, eliminating all five digit CACs will suppress competition by creating customer confusion and frustration, ultimately leading to the exclusive use of entrenched presubscribed long distance carriers, and the severe diminution of business for smaller dial-around long distance telephone services, such as that provided by VarTec.

Eliminating five-digit CACs, and pushing smaller IXC's out of the dial-around arena, and forcing them to compete to become the PIC, exposes VarTec to large IXC's predatory marketing techniques. Large IXC's target the PIC customers of smaller IXC's, and offer substantial incentives (such as \$100 rebate coupons) to entice those customers to switch to the larger IXC. The larger IXC can obtain a roster of the smaller IXC's PIC customers, creating a target list of potential customers. Thus, the larger IXC can target the smaller IXC's PIC customers. If the Commission's regulations seriously impair VarTec's ability to compete with larger IXC's through its dial-around service, and effectively leave VarTec with the opportunity to only compete to become the PIC, then those regulations effectively eliminate competition from VarTec and smaller dial-around IXC's.

CAC expansion will result in increased customer confusion and dialing time, especially for pulse dialed calls and dialing errors. Customers will also surely be confused by the multitude of "re-education" materials sent by dial-around long distance carriers. These education programs will place an onerous burden on small dial-around carriers, who must expend significant resources to produce such "educational" materials.¹⁴ The increased time and effort in dialing a longer CAC will impair

¹⁴ The costs that VarTec would incur to contact existing customers is identified in Exhibit One.

dial-around carriers' ability to attract customers. The public will perceive seven-digit CACs as too cumbersome, and will be more likely to opt for presubscribed long-distance service.

The Commission expressed concern that allowing five digit CACs to operate contemporaneously with seven digit CACs would create unreasonable discrimination after the transition period.¹⁵ Yet, VarTec's grandfathering plan preserves the current state of competition by allowing five digit CAC operators to avoid suffering a diminution of business from the customer confusion caused by a full-scale conversion to seven digit CACs. Furthermore, as discussed supra, all interexchange carriers can compete to become a subscriber's PIC, which allows calls to be placed by dialing fewer digits and no CAC. Meanwhile, the Commission's plan widens the competitive gap between presubscribed carriers, such as AT&T, and dial-around service providers by creating customer confusion and frustration so that the dial-around carriers' customers will opt for the convenience of presubscribed long-distance carriers.

VarTec's grandfathering plan merely endorses the notion of "first-come, first-serve," which the Commission has repeatedly held to be "reasonable" under the Act.¹⁶ In the Local Competition Order, the Commission has held that entities with preexisting pole attachments shall not be charged for facilities modified at the initiation of later entrants on the pole, even if the earlier entrant benefitted from such modification. "We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other

¹⁵ See Report and Order at para. 32.

¹⁶ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (released Aug. 8, 1996) ("Local Competition Order"); see also In the Matter of the Use of N11 Codes and Other Abbreviated Dialing Arrangements, First Report and Order and Further Notice of Proposed Rulemaking, FCC 97-51 (released Feb. 19, 1997) ("N11 Order").

parties with preexisting attachments on the newly modified facility."¹⁷ Thus, if a larger pole is needed to make space for a later entrant on the pole, then those with preexisting attachments did not have to pay for the modification costs - - an endorsement of "first-come, first-service." Moreover, in the N11 context, the Commission stated there appeared "to be no regulatory or legal impediment" preventing assignment of N11 codes "in a reasonable, non-discriminatory manner, which may include, for example, assigning N11 codes on a first-come, first-service basis."¹⁸

For many years prior to equal access, the FCC allowed AT&T's customers to receive service from AT&T without dialing extra digits although customers of AT&T's competitors were required to dial extra digits. Customers of competitors to the Bell Operating Companies ("BOCs") for intraLATA toll service have also been required for several years to dial extra digits while the BOCs' customers have not. In both contexts, the FCC concluded that it would not serve the public interest to require the customers of AT&T or the BOCs to dial extra digits merely to require all consumers to dial the same number of digits. Likewise, it would not serve the public interest for VarTec's customers to be forced to dial more than a five digit CAC merely because CACs have been expanded to seven digits for some carriers.

VarTec's grandfathering plan is non-discriminatory because it is founded on the equitable principle of first-come, first-service. Holders of five digit CACs fairly received their CAC assignments on a first-come, first-service basis just as N11 codes have been assigned. Five digit CAC holders should not be punished for the entrance of seven digit CAC users in the long distance

¹⁷ Local Competition Order at 16097 (emphasis added).

¹⁸ N11 Order at para. 7 (citing Letter from Robert L. Pettit, FCC General Counsel, to David J. Markey, Vice President, BellSouth, dated May 4, 1992).

market, just as preexisting pole attachment owners should not be harmed by subsequent pole attachments.

III. ADMINISTRATIVE PROCEDURE ACT.

The Commission's Decision is Arbitrary and Capricious.

Agency action that is arbitrary and capricious violates the APA.¹⁹ The Commission's Report and Order is arbitrary and capricious because it does not further the Commission's goals in the above-captioned proceeding.²⁰ The primary purpose of the rulemaking was to ensure that an adequate number of CICs were available for "new services and technologies and to support continued economic growth."²¹ The Report and Order accomplishes the opposite. Barring the grandfathering of five digit CACs actually decreases the number of available CACs in the long run, and creates consumer confusion that will cause dial-around businesses to suffer lost revenues, further depressing competition in the long-distance market. The Commission manages CICs to foster competition in interstate telecommunications.²² An estimated 104 companies now have multiple

¹⁹ 5 U.S.C. § 706.

²⁰ Bechtel v. FCC, 10 F.3d 875, 885-886 (D.C. Cir. 1993).

²¹ NPRM at para. 2.

²² See Report and Order at para. 2 (citing Exchange Network Facilities for Interstate Access (ENHA), Memorandum Opinion and Order, 71 FCC 2d 440 (1979); MTS and WATS Market Structure, Report and Third Supplement Notice for Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980); Electronic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnections, Jurisdictional Separators and Practices Relating to /Customer interconnection, Jurisdictional Separations and Rate Structures, Docket No. 20003, Second Report (1980).

CICs.²³ Because the Commission acted arbitrarily and capriciously in adopting the Report and Order, it should reconsider and vacate its decision to eliminate all five digit CACs.

IV. THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

The Commission's Report and Order Has Effected a Taking of VarTec's Property Interests Without Just Compensation in Violation of the Fifth Amendment.

The Commission has violated the Fifth Amendment of the U.S. Constitution by taking VarTec's "property" without just compensation. The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation."

The Commission's action in stripping VarTec of its five digit CACs effective January 1, 1998, would cause an uncompensated taking of several property interests of VarTec, including: the goodwill VarTec has established through several years of extensive (and expensive) marketing of its CACs; the service mark rights VarTec has established in its CACs; and VarTec's entitlement to engage in its chosen trade and business using the CACs in which it has invested tremendous resources with the reasonable expectation that it could continue to reap the benefits of that investment.

It is well accepted that intangible property interests, such as goodwill, trade secrets and contract rights, are subject to the same Fifth Amendment protections from regulatory actions as are more conventional forms of physical property.²⁴ "Property" interests also include a broad range

²³ Report and Order n.9 (citing letter from Nancy Fears, Bell Communications Research, NANP Administration, to Elizabeth Nightingale, FCC Common Carrier Bureau, dated April 4, 1997).

²⁴ Kimball Laundry Co. v. United States, 338 U.S. 1, 8-12 (1949) (recognizing goodwill as a
(continued...))

of interests that are secured by “existing rules or understandings.”²⁵ The right “to engage in a particular trade or business” is “property” protected by the Fifth Amendment, as are other rights associated with a citizen’s chosen trade or profession.²⁶ The courts have recognized that a license to fish in particular waters is a property right which is compensable under the Fifth Amendment if taken by the federal government,²⁷ as are long-term state leases used for oyster propagation.²⁸

VarTec has built its entire business around the promotion of its CACs.²⁹ It has incurred millions of dollars in marketing costs, including the development, production and mailing of promotional brochures, explanatory letters, and stickers, all of which prominently feature VarTec’s CACs and which are carefully designed to communicate information about VarTec’s CACs to consumers.³⁰ VarTec’s customers are both familiar and comfortable with these CACs. Indeed,

²⁴ (...continued)
property interest); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984) (trade secrets are property rights protected under takings clause).

²⁵ Perry v. Sindermann, 408 U.S. 593, 601 (1972).

²⁶ Greene v. McElroy, 360 U.S. 474, 491 (1959); Chalmers v. City of Los Angeles, 762 F.2d 753, 756-757 (9th Cir. 1985); see also Goldsmith v. United States, 270 U.S. 115 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (right to obtain a retail liquor store license); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961) (right to attend a public college).

²⁷ See Todd v. United States, 155 Ct. Cl. 111 (1961).

²⁸ See Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996).

²⁹ VarTec’s CACs are essential to VarTec’s ability “to engage in a particular trade or business,” which is in itself a property right subject to protection under the Fifth Amendment. Greene v. McElroy, 360 U.S. 474, 491 (1959); Chalmers v. City of Los Angeles, 762 F.2d at 756-757.

³⁰ Samples of those materials are attached as Exhibit Two; the amount that VarTec has spent in marketing its services through materials such as these since 1991 is identified in Exhibit One. Additionally, VarTec has expended substantial resources for its telemarketing program, in which identification of VarTec’s CACs in the course of soliciting business is the primary objective.

VarTec's CACs are the only means by which most of its customers recognize VarTec's service. Dial-around long-distance customers may not remember the name VarTec, but they do remember to dial "1-0-8-1-1" to receive VarTec's service.³¹ These CACs have come to represent all of the goodwill that VarTec has established in its company. If the CACs are taken away by the FCC's action, so will that goodwill be taken. VarTec will be forced to start from scratch. After spending years and tremendous sums of money carefully cultivating a customer base of people who know that they will receive the highest quality service when they dial "1-0-8-1-1",³² VarTec will be left with customers who call "1-0-8-1-1" after January and hear an error message.

Through its promotional efforts, VarTec has achieved its goal of creating an association in the minds of its customers between its five digit CACs and its business. The CACs are the symbols by which VarTec is recognized by the public. They have become VarTec's service marks, entitled to all of the protections of the trademark laws.³³ These trademarks are no doubt more identifiable with its service, and therefore more valuable to VarTec, than the company's very name.

It has been recognized for more than a hundred years that trademarks and service marks are property rights, entitled to all of the protections extended to other forms of private property. See e.g., The Trademark Cases, 100 U.S. 82 (1879) ("The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion

³¹ For VarTec's customers this number is as familiar as the widely publicized, dial "1-0-A-T-T."

³² VarTec owns other CACs, but the 10811 is its most used and most valuable CAC, and so is used for example purposes herein.

³³ See American Express Travel Related Services Co. v. Accu-Weather, Inc., 849 F. Supp. 233, 240 (S.D.N.Y. 1994) (recognizing service mark rights in a particular telephone number promoted in the sale of the telephone number owner's services).

of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. It is a property right for the violation of which damages may be recovered in an action at law”) (emphasis added). A government taking of a trademark without providing just compensation is a clear violation of the Fifth Amendment to the Constitution.³⁴

VarTec engaged in its massive marketing effort centered around promotion of its CACs with the expectation of reaping a return on its investment. Up until the institution of this proceeding, VarTec had no reason to suspect that the Commission would attempt to take away VarTec’s CACs, which constitute the lifeblood of VarTec’s business. In reliance on its exclusive rights to the CACs which it owned, VarTec went forward with its investment. The Fifth Amendment mandates just compensation where a government action interferes with a reasonable investment-backed expectation and substantially diminishes the value of property owned by a business.³⁵ The Report and Order goes way beyond interfering with VarTec’s reasonable expectations for a return on its investment, and way beyond diminishing the value of its CACs. It destroys those expectations and eliminates that value.

³⁴ Maltina v. Cawy Bottling Co., 462 F.2d 1021, 1027 (5th Cir. 1972); see also Friedman v. Rogers, 440 U.S. 1, 12 n.11 (1979) (recognizing trade names as valuable property rights of a business, protected from appropriation by others, but noting that no claim of a taking had been raised in that case).

³⁵ See Ruckelshaus v. Monsanto, 467 U.S. at 1010-13; Tri-Bio Labs., Inc. v United States, 836 F.2d 135, 140-1 (3d Cir. 1987); see also Cabo Distributing Co., Inc. v. Brady, 821 F. Supp. 601, 609 (N.D.Cal.1992) (expenditures of substantial funds in reliance on certificates of label approval issued by Bureau of Alcohol, Tobacco & Firearms creates property rights in label subject to Fifth Amendment protection).

The Commission's action effects a taking without compensating VarTec for its goodwill and service marks, and interferes with a reasonable investment-backed expectation. Because of the manner in which the Commission's regulatory scheme deprives VarTec of all value of its established CACs, it results in a per se, categorical taking of property rights, as was the case in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). The Lucas case involved two residential lots on a South Carolina barrier island, where the owner intended to build single-family homes such as those on the immediately adjacent parcels. However, the state legislature enacted a statute which barred the owner from erecting any permanent habitable structures on his land for the purpose of protecting people and property from storms, high tides and beach erosion. The Supreme Court held that when government calls upon the owner of property to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.³⁶

The analysis in Lucas demands the same result here. Before the Commission's Report and Order, VarTec built a long distance telephone service through its five digit CACs. Like the property owner in Lucas, VarTec has invested in the productive use of its CACs. VarTec invested substantial time and millions of dollars in hiring employees, acquiring equipment and leasing facilities in order to apply its CACs to productive use. VarTec has spent millions of dollars designing, producing, and mailing promotional materials, including stickers and explanatory letters, to educate consumers of its long-distance calling option. Only through this enormous effort can VarTec familiarize consumers with its service to the point where people remember its CACs. VarTec has thereby acquired a property interest in its CACs.

³⁶ Lucas, 505 U.S. at 1019.

The Commission's Report and Order completely frustrates VarTec's constitutionally-protected entitlement--the right to preserve the customer base and good will associated with its five digit CACs and to provide long distance telephone service to those customers that know VarTec only by its CACs. By requiring VarTec to sacrifice all economically beneficial uses of its five digit CACs without just compensation, the Commission has violated the Takings Clause of the Fifth Amendment.

The right to use VarTec's CACs is also a property interest protected by the Fifth Amendment to the extent that VarTec's acquisition of rights to its CACs is consistent with the "existing rules or understandings"³⁷ embodied in the Communications Act. The Commission's duty pursuant to § 257 of the Communications Act to eliminate market entry barriers for small businesses, and its mandate under the Regulatory Flexibility Act to consider alternatives that minimize the impact on small businesses, are an important part of these "existing rules or understandings." When, as in VarTec's case, a regulation that declares "off-limits" all economically productive or beneficial use of a person's CAC goes beyond what the relevant principles of the Communications Act and Regulatory Flexibility Act would dictate, the government must pay compensation to sustain it.³⁸

The Report and Order, as applied to VarTec's five digit CACs, has deprived VarTec of its property and its liberty to pursue its chosen line of business (to provide an alternative long distance telephone service to the American people). The same can be said for the other CAC owners who will be impacted in a similar manner by the Commission's action. Each will have a claim for a taking. Although VarTec and other CAC owners will have a claim under the Tucker Act to pursue

³⁷ See Perry v. Sinderman, 408 U.S. at 601.

³⁸ See Lucas, 505 U.S. at 1031.

in the Court of Claims, the Commission should act now to eliminate the need to resort to that remedy. The Commission's order directly implicates the Just Compensation clause of the Fifth Amendment. The question must be asked, however, whether the Communications Act provides an express authorization for the Commission to effect such a taking, across such a broad class of CAC owners. If it does not, the Commission's action should be rescinded. "Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."³⁹ A policy of avoidance should take effect where "there is an identifiable class of cases in which application of a statute will necessarily constitute a taking."⁴⁰ If Congress does not expressly authorize use of the takings power by a government agency, a government action causing such a taking in an identifiable class of cases will be ruled invalid.⁴¹

The Commission relies on 47 U.S.C. § 251(e)(1) for its authority in this action.⁴² Section 251 generally authorizes the Commission to create or designate impartial entities to administer the telecommunications numbering system and to make numbers available. It also generally provides jurisdiction over the North American Numbering Plan to the extent it pertains to the United States. Nowhere in that section of the Act, however, is there any grant of authority for the Commission to take private property in the course of performing its general administrative function. In light of that fact, the Commission does not have the power to take an action that will expose the U.S. Treasury

³⁹ BellAtlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994), citing Rust v. Sullivan, 500 U.S. 173, 190-1 (1991); Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575-78 (1988).

⁴⁰ Bell Atlantic, 24 F.3d at 1441, (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 n. 5).

⁴¹ Id. at 1446.

⁴² Report and Order at para. 11.

to "massive and unforeseen" takings claims by VarTec and hundreds of other five digit CAC owners.⁴³ For that reason, the Commission's action in taking all five digit CACs, despite the availability of the grandfathering alternative proposed by VarTec which will accomplish the same objectives without the need for a wide scale and expensive takings process, is impermissible, and should be rescinded.

V. THE FIRST AMENDMENT OF THE U.S. CONSTITUTION

The Commission's Action Infringes VarTec's Rights Under the First Amendment.

Commercial speech is defined as that speech which proposes a commercial transaction.⁴⁴ Trademarks, trade names and other symbols used to communicate information to consumers about the owner's products or services are forms of commercial speech, entitled to protection under the First Amendment.⁴⁵ The nature of the service marks at issue here, VarTec's CACs, presents an even stronger case for commercial speech than most service marks because, in addition to serving as indications of the origin of VarTec's services (the function of a service mark), they also communicate useful information to consumers regarding the manner in which VarTec's services can be utilized.

The Commission's action will block VarTec from using the service marks/CACs that it has been using for several years and which it has spent millions of dollars promoting so that the public

⁴³ See Bell Atlantic, 24 F.3d at 1446.

⁴⁴ Board of Trustees of SUNY v. Fox, 492 U.S. 469, 473-74 (1989).

⁴⁵ See, e.g., Friedman v. Rogers, 440 U.S. at 11; Adolph Coors Co. v. Brady, 944 F.2d 1543, 46 (10th Cir. 1991); Hornell Brewing Co., Inc. v. Brady, 819 F.Supp. 1227, 1233 (E.D.N.Y. 1993); Sambo's of Ohio v. City Council of City of Toledo, 466 F.Supp. 177, 179 (N.D. Ohio 1979).

has come to associate those CACs with VarTec's services. VarTec will no longer be able to communicate a message that is critical to VarTec's commercial success, i.e., "1-0-8-8-1" (using VarTec's most popular CAC as an example). Presently, that service mark communicates the message that customers can dial those numbers before placing a long distance call and utilize the long distance services of VarTec, frequently at a price less than that which would be charged if VarTec's CAC were not used. Thus, that CAC service mark "proposes a commercial transaction"⁴⁶ on behalf of VarTec, and is commercial speech entitled to the protection of the First Amendment.

Commercial speech restrictions must pass the demanding test set forth in Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343 (1980). Under that test, regulation of commercial speech is permitted only where: (1) the speech concerns lawful activity and is not deceptive; (2) the regulation serves a substantial government interest; (3) the restriction directly advances the government's asserted interest; and (4) the restrictions are narrowly tailored and are "not more extensive than is necessary" to advance those interests.⁴⁷

The Commission's action fails to meet this test. Even if it is assumed that the Commission's plan directly advances the interest in making more CACs available (it is true that under the Commission's plan more CACs will be available than if the plan is not enacted), the fourth prong of Central Hudson requires the government to show that the regulatory action is in proportion to the interest asserted.⁴⁸ This requires that the action be no more extensive than necessary to further the

⁴⁶ Board of Trustees of SUNY v. Fox, 492 U.S. at 473-74.

⁴⁷ Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 100 S.Ct. at 2351.

⁴⁸ Board of Trustees v. Fox, 492 U.S. 469, 476 (1989).

government's interest.⁴⁹ It must be narrowly tailored to the government's interest and must not "burden substantially more speech than is necessary to further the government's interest."⁵⁰ In other words, there must be a "reasonable fit" between the government action and the government's interest, and the cost of burdening speech must be "carefully calculated" by the government.⁵¹

For the reasons already discussed, VarTec's grandfathering plan comes closer to advancing the Commission's interest in making an increased number of CACs available than does the Commission's approach, and it better achieves the government's interest without the huge cost to the owners of five digit CACs that comes with the Commission's plan. For this reason, it is obvious that there is not a good "fit" between the Commission's announced objective and the means employed to get there. Precedent requires the government to give alternatives that are less restrictive to commercial speech serious consideration, and choose those alternatives that will achieve the government interest with less intrusion on the First Amendment.⁵² A restriction on commercial speech, such as that resulting from the Commission's action here, cannot be considered "sufficiently tailored to its goal" under the Central Hudson test if other options exist "which could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights."⁵³

⁴⁹ Central Hudson, 447 U.S. at 569-70.

⁵⁰ Board of Trustees v. Fox, 492 U.S. at 477-8.

⁵¹ Id., at 480.

⁵² City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 1510 n.13 (1993); Rubin v. Coors Brewing Co., 115 S.Ct. 1585, 1593 (1995); Hornell Brewing Co. v. Brady, 819 F. Supp. at 1239.

⁵³ Coors, 115 S. Ct. at 1593.

VarTec has presented the Commission with one such option, and respectfully urges the Commission to choose that option in order to prevent an unnecessary infringement of VarTec's First Amendment rights to commercial speech. At the very minimum, the Commission must "carefully calculate" the cost (to CAC owners and the public) of adopting its plan over the grandfathering plan proposed by VarTec, before blocking VarTec and other CAC owners from continuing to communicate their current service marks/CACs to the public.

VI. THE COMMUNICATIONS ACT AND REGULATORY FLEXIBILITY ACT.

The Report and Order Violates the Communications Act and the Regulatory Flexibility Act by Creating a New Market Entry Barrier for Small Businesses and Failing to Consider Alternatives that Will Have a Less Onerous Impact on Small Businesses.

Pursuant to § 257 of the Communications Act, it is the duty of the Commission to eliminate market entry barriers for small businesses.⁵⁴ In adopting new regulations, the Regulatory Flexibility Act ("RFA") requires the Commission to consider significant alternatives that minimize the impact on small businesses.⁵⁵ These standards are part of the "existing rules and understandings" that allow a small company such as VarTec to compete against larger carriers, such as AT&T, by providing "dial-around" long distance telephone service.

Rather than provide regulatory flexibility for small businesses like VarTec, the Commission created a new market entry barrier for this small U.S. business by adopting a policy that completely frustrates VarTec's ability to compete against entrenched, presubscribed long distance carriers.⁵⁶

⁵⁴ 47 U.S.C. § 257.

⁵⁵ 5 U.S.C. § 603, et seq.

⁵⁶ The Commission also rejected other VarTec comments that would promote fair competition, such as reclamation of all unused CICs, ordering LECs to educate consumers
(continued...)